With a realization of these impeding circumstances, the Comissioners have recently divided the Uniform Act into two parts, one dealing with the causes of divorce, the other with procedure and jurisdiction,[38] in the hope that at least the troublesome problems of the conflict of laws may be eliminated if the states are unwilling to change the substantive law. Constant pressure seems the only force that will induce legislatures to act upon these domestic questions, and bring about much-needed and wholesome reform.

JUDICIAL NOTICE OF THE LAW OF FOREIGN STATES.—The general rule that judicial notice cannot be taken of foreign law has a basis in sound reason when the foreign jurisdiction is one of fundamentally different legal tradition. Security and the expedition of the court's business may be served by demanding proof of such laws by documents and witnesses. The states of the Union are foreign to one another. With a logical thoroughness which disregards good sense, the courts of the states generally demand proof of the laws of sister states as fact.[1] Two patent inconsistencies result: this proof, according to the better authority, is directed to the judge, and not to the jury.[2] This is tacit recognition that the determination of the law governing the case, whether *lex fori* or foreign law, is properly within the province of the judge. And further, the judge is always permitted to consult the decisions of other jurisdictions to throw light on the law of his own state; yet he may not use these same cases to say what they declare to be the law of their own state.

A morass of presumptions results, confusing, certain to work substantial injustice in many cases, and fostering the layman's prejudice against the technicalities of the courts. In the absence of proof to the contrary, it is generally presumed that the common law of other states is the same as that of the forum.[3] Some states even presume the law of sister states to be the same as their own statute law,—a most unwarrantable assumption.[4] These presumptions disregard the many points on which the states have variant rules based on differing interpretations of the body of tradition constituting the common law. And there is always the case which has never arisen in the forum; there is then a last presumption to which to resort: that the general common law is in force in the foreign state.[5]

It is difficult to see how a New Jersey judge, writing in the year 1912, can seriously announce that since the New York law of negotiable instruments has not been put in evidence, it must be presumed that the common law is there in vogue; and can offer as a statement of the

---

[38]Proceedings, 28th Annual Conference (1918) 48, 101.

[1]17 Columbia Law Rev. 255.

[2]Hooper *v.* Moore (N. C. 1857) 5 Jones Law 130; 4 Wigmore, Evidence § 2558.

[3]1 Greenleaf, Evidence (16th ed.) § 43.

[4]6 Columbia Law Rev. 469.

[5]Merrick *v.* Betts (1913) 214 Mass. 223, 101 N. E. 131; 2 Chamberlayne. Evidence § 1212.

existent New York law a case from the Term Reports of 1791.[6] Judges themselves have not been slow to recognize that justice is only hampered by refusing to credit the court with knowledge which is accessible to any one upon the exercise of slight diligence.[7]

Several states have corrected this archaism of procedure by enacting that their courts shall take judicial notice of the laws of other states[8] in the same manner as if the question were to arise under the laws of the forum.[9] This result was long ago reached by some courts which thought that the full faith and credit clause of the Constitution demanded it; and that if the court of last resort took judicial notice of state laws, uniformity of procedure favored the state courts' so doing.[10] This reasoning,—of which echoes are still heard,—[11] was discredited by *Hanley* v. *Donoghue*,[12] in which the Supreme Court made clear that while it took judicial notice of state laws in cases of Federal origin, in cases arising in state courts it regarded as fact that which was fact below,—a sufficiently anomalous situation.

The operation of the statutes referred to is simple enough. When it appears that the law of another state is material to the case, the court addresses itself to the law of that state, and the arguments of counsel and researches of the judge are based on the decisions of that state without more ado. This procedure commends itself as being eminently practical. It has been argued in favor of the present general series of presumptions that they make for convenience and are based on the probability that they will lead to the actual truth.[13] But the effort necessary in practice to determine the *lex fori*, which in theory the court "knows", could just as conveniently be applied to the law of the sister state,—especially with the present apparatus of digests and texts not in existence when the old rule was established. And rules of procedure should not prevent the judge from applying his actual knowl-

---

[6]Bodine *v.* Berg (1912) 82 N. J. L. 662, 82 Atl. 901. For other examples of "this odd determination of our judges to remain in official ignorance of what every lawyer knows", see Chafee, Bills and Notes (1919) 33 Harv. Law Rev. 255.

[7]Missouri *etc.* Co. *v.* Lovelace (1907) 1 Ga. App. 446, 58 S. E. 93; Southern Ry. *v.* Diseker (1913) 13 Ga. App. 799, 804, 81 S. E. 269; Hooper *v.* Moore, *supra*, footnote 2.

[8]Arkansas, Kirby's Digest 1916 § 9751 (Act of April 11, 1901).

[9]Mississippi, Hemingway's Ann. Code 1917 § 735. West Virginia, Barnes' Ann. Code 1918 c. 13 § 4. Other statutes are couched in permissive language: Connecticut, Gen. Stat. 1918 § 5727; New Jersey, Comp. Stat. 1910, p. 2229 § 26. This fact has led the courts to fall back on the old rules in a few instances: Corryel *v.* Buffalo Furnace Co. (1915) 88 N. J. L. 291, 96 Atl. 55 (Pennsylvania law held a fact for the jury); Bodine *v.* Berg, *supra*, footnote 6; Hoxie *v.* N. Y., N. H. & H. RR. (1909) 82 Conn. 352, 73 Atl. 754 (in absence of allegation, Massachusetts law presumed to be that of the forum). Examples of what is believed to be the better interpretation of these statutes are seen in: Lockwood *v.* Crawford (1847) 18 Conn. 361, 370; Appeal of Eva (1918) 93 Conn. 46, 104 Atl. 238; Dimick *v.* Insurance Co. (1903) 69 N. J. L. 384, 400, 55 Atl. 291.

[10]Ohio *v.* Hinchman (1856) 27 Pa. 479, 483; Paine *v.* Schenectady Insurance Co. (1876) 11 R. I. 411; Rae *v.* Hulbert (1856) 17 Ill. 572, 578.

[11]Miller *v.* Miller (1916) 90 Wash. 333, 340, 156 Pac. 8.

[12](1885) 116 U. S. 1, 6, 6 Sup. Ct. 242.

[13]Wright *v.* Delafield (N. Y. 1857) 23 Barb. 498, 513.

edge because the pleadings and proof have not put the question before him.[14]

The experience of Connecticut, which has permitted judicial notice of the law of foreign states since 1840, and of the other states where this rule obtains, should commend similar statutory reform to the state legislatures generally.

---

[14]Thus a Massachusetts court construed a Vermont statute, which omitted clauses contained in the cognate Massachusetts statute, in the light of the common law principles derived from its interpretation of its own statute; although the Massachusetts rule, turning upon the omitted clauses, obtains in only two states. 19 Columbia Law Rev. 408. The court regretted that there was not fuller evidence of the Vermont law. Holden *v.* McGillicuddy (1913) 215 Mass. 563, 102 N. E. 923.